25405

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 249.

WILLIAM H. CARSON, PLAINTIFF IN ERROR,

vs.

THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, PLYMOUTH COUNTY, MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED APRIL 11, 1900.

(17,713.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1900.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the justices of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between William H. Carson, of Brockton, in the county of Plymouth, in the said Commonwealth, petitioner, and The Sewerage Commissioners of the City of Brockton, of said Brockton, in said county of Plymouth, respondents, upon a petition for a writ of certiorari, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said petitioner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifth day of March, in the year of our Lord one thousand nine hundred.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
OLIVER WENDELL HOLMES,
Chief Justice Supreme Judicial Court.

1—249

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

And now here the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court within and for said county of Suffolk, have hereto set my hand and the seal of said court this twenty-first day of March, [SEAL.] A. D. nineteen hundred.

JOHN NOBLE, *Clerk.*

3 & 4 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, holden at Boston, within and for said county of Suffolk, from the first day of January, in the year of our Lord one thousand nine hundred, to the first day of January, A. D. 1901, it is thus contained, the following being the entire record in the case:

5 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

WILLIAM H. CARSON, Petitioner for Certiorari,
v.
THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, Respondents.

Petition.

To the honorable the justices of the supreme judicial court within and for the county of Suffolk:

Respectfully represents William H. Carson of Brockton in our county of Plymouth, that he is a citizen and a tax-payer of said Brockton, and was on May 1, 1898, and still is, seised and possessed of a certain parcel of land situated in said Brockton, and more particularly described in Schedule A, hereto annexed; that on August 23, 1894, the common council of said city of Brockton did pass an ordinance in relation to sewerage and sewerage assessments of said city of Brockton, which was passed to be ordained in concur-
6 rence by the board of aldermen of said city of Brockton, August 27, 1894, and approved September 4, 1894, by John J. Whipple, mayor of said city of Brockton, as follows:

"*An Ordinance in Relation to Sewerage and Sewerage Assessments.*

"Be it ordained by the city council of the city of Brockton, as follows:

"SECTION 1. The sewerage construction commissioners, shall have the direction and control, subject to orders of the board of aldermen, of all the common sewers of the city and of the construction, maintenance, repair and use of the same and may make such rules and regulations relating thereto as they shall judge expedient, subject to the approval of the board of aldermen. The city engineer under the direction of said commissioners, shall have the general supervision and inspection of the construction and maintenance of all common sewers built or owned by the city and of all connections of particular sewers built under the provisions of section 4 of chapter 245 of the Acts of 1892. He shall make and prepare all plans and needed specifications designed to govern the work of construction; when the sewers are to be constructed, he shall cause accurate plans thereof to be made, representing the location, depth, and material, with a section plan of each sewer indicating the size, shape, thickness and construction. and he shall cause to be shown upon said plan all existing connections of said sewers, and all public connections as they are made.

"SECTION 2. One-half of the whole cost of the sewerage system, estimated at $1,300,000.00, including the cost of laying, making and maintaining its common sewers, shall be paid by equitable annual charges or rents for the use of such sewers by the persons who enter the same, and one-fourth part of such whole cost shall be paid from assessments upon estates receiving benefit according to the frontage of such estates on any street or way when a sewer shall be constructed and according to the area of such estates within a fixed depth as hereinafter prescribed, and the remainder shall be paid by the city and raised by general taxation: all of said assessments, charges and rents to be made, certified and collected as hereinafter prescribed.

"SECTION 3. An assessment shall be made upon the owners of abutting estates, by a fixed uniform rate based upon the estimated cost of the entire system, of fifteen cents ($0.15) a linear foot of frontage of such estates on any street or way where a sewer is constructed, and of three mills (0.003) a square foot, according to the area of such estates within a fixed depth of 125 feet from such street or way; but no area shall be assessed more than once.

"No assessment in respect to any such estate which, by reason of its grade or level, or for any other cause, cannot be drained
7 into such sewer shall be made, certified, or notified until such incapacity is removed. When such estates abut upon more than one such street or way, such assessment shall be made upon the whole of the longest frontage, and sixty feet of the frontage upon each other such street or way shall be exempted from such assessment, but all in excess of said sixty feet exempted shall be subject to assessment.

"In making such assessment the frontage shall be assessed to the nearest foot and the areas shall be determined from the plans on file at the assessor's office.

"The sewerage construction commissioners shall direct the city engineer to prepare and submit plans to the board of aldermen, showing the estates to be assessed, giving the owners' names, frontages and areas, together with a schedule showing the assessments on the estates abutting and benefited. The amount assessed and certified by the mayor on behalf of said board shall be entered upon the plans prepared for assessment, and shall, for two years after they are laid, constitute a lien on the real estate assessed, and shall, together with all incidental costs and expenses, be levied by sale of such real estate, if the assessment is not paid within three months after a written demand for payment, made upon the person assessed, or upon the person occupying the estate; such sale to be conducted in like manner as sales for the payment of taxes.

"Owners of estates or parts of estates not liable to assessment as aforesaid, or not in fact assessed, shall pay for special benefits to such estates such reasonable sums as the mayor and aldermen shall determine.

"The collector of taxes upon receipt of the schedule of assessment certified by the mayor, shall forthwith render notice of assessment and amounts of the same to the parties assessed therein, and the said amount shall be due and payable thirty days from the date of such notice, after which time interest will be charged thereon at the rate of six per cent. per annum.

"SECTION 4. Every person or owner of an estate who enters his particular sewer into a common sewer, shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: for unmetered water service, eight dollars; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than eight dollars, it being provided however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or
8 owner may place at his own expense a water meter which shall be approved by the said commissioners to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the city of Brockton.

"SECTION 5. The city council shall appropriate annually to be raised by taxation, a sum not less than one-fourth nor more than two-thirds of the annual sewerage expenses, including instalments, interest on bonds and maintenance, sufficient to meet all deficiencies in the preceding year.

"SECTION 6. Whenever any street is opened for the laying of pipes

for water, gas, or other purposes, or for the prosecution of any works of construction, such laying of pipes and the work connected therewith, or such work of construction, shall be so executed as not to obstruct in any way the course, capacity or construction of a common sewer; and whenever pipes for any purpose or any work of construction are found to exist at such depth, or in such location as to interfere with any existing sewer, or with the building of any common sewer of the required size, and at the proper depth and grades, the department, corporation, or person maintaining the same shall, upon notice thereof, at once remove, change, or alter said pipe or pipes, or other works, in such manner as the sewerage construction commissioners may direct. If such department, corporation, or person, negiects to comply immediately with the the terms of such notification, the sewerage construction commissioners may make such removal, change or alteration, and the cost thereof shall be paid by such department, corporation or person.

"SECTION 7. All applications for the construction of particular sewers and their entrances into common sewers, and for permits to enter the same shall be in such form as the sewerage construction commissioners shall prescribe, and be filed with the city engineer. All such particular sewers, and their entrances into common sewers, shall be constructed, maintained and kept in proper repair by the sewerage construction commissioners, and shall be the property of the city; and the cost thereof shall be paid by the owners of the estates connecting, before the same are used or house connections made therewith; the cost of all repairs made thereon shall be paid by the owners of estates connecting.

"SECTION 8. No person shall enter or attempt to enter a private drain or sewer into a common sewer or its connections, or into the underdrain constructed in connection therewith, except he is duly licensed thereto, and no person shall cut into, interfere with, or obstruct a common sewer.

9 "SECTION 9. No person shall throw or discharge into a public sewer or any of its connections, any steam or any other matter or thing which may tend to, or cause, an obstruction thereof, or a deposit therein or any injury thereto.

"SECTION 10. Any person violating any of the provisions of this ordinance shall be punished by a fine not exceeding twenty dollars for each offence.

"IN COMMON COUNCIL, *Aug.* 23, 1894.

"Passed to be ordained and sent up for concurrence.

"CHARLES WILLIAMSON, *President.*

"IN BOARD OF ALDERMEN, *August* 27, 1894.

"Passed to be ordained in concurrence.

"C. C. CROOKER, *President.*

"Approved Sept. 4, 1894.

"JOHN J. WHIPPLE, *Mayor.*

"A true copy.

"Attest: DE WITTLE PACKARD, *City Clerk.*"

[CITY SEAL.]

That, in accordance with said ordinance of the said city of Brockton, the sewerage commissioners of said city added to the taxes assessed on the petitioner's land a separate tax or rental charge amounting to $42.53, for the maintenance and operation of the sewerage works of said city, and made demand upon the petitioner July 1, 1899, for the above-mentioned sum of $42.53, as a rental charge or assessment for the use of said sewer, by sending a tax bill for the aforesaid amount, which tax bill is hereto annexed marked B.

And your petitioner alleges that said tax or sewerage rental charge of the board of sewerage commissioners made under the power derived from said ordinance of the city of Brockton, with the approval by the mayor of said city, charging the estate of your petitioner with the sum of $42.53 as aforesaid, is illegal and void, for the following reasons:

1. Because said ordinance, under which said tax or sewerage rental was made, does not provide for either notice or hearing of persons whose estates are affected thereby, which is contrary to and in violation of articles 10, 11, 12, 15, of part I of the constitution of Massachusetts.

2. Because the method of computing said sewer charges, which your petitioner was informed was adopted by said sewerage commissioners, to wit, "For unmetered water service $8. For metered water service thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter, readings taken by the water commissioners, but the annual charge shall in no case be less than $8," is unreasonable and disproportionate, and in violation of section 4 of chapter I, part II, of the constitution of Massachusetts.

3. Because your petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax or rental for the maintenance and operation of sewers from which he receives no special benefit.

4. Because said tax or sewer rental, and the ordinance authorizing the same, is in violation of the provisions of section 1 of the fourteenth amendment of the Constitution of the United States, and is therefore illegal and void.

5. Because said tax or sewerage charge is permissible under the constitution of this Commonwealth, or under the Constitution of the United States, only when founded upon special and peculiar benefits to the property so taxed, and then only to the amounts of such special and peculiar benefits.

6. Because, where lands have been assessed for special benefits from the construction of sewers by whose operation they are effected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of said sewers such as to subject them to a special tax or charge, for the reason that expenses of this kind should be made subject of general taxation.

Wherefore your petitioner prays for a writ of certiorari, to be directed to the Board of Sewerage Commissioners of the City of Brockton, directing them to bring up before your honors the several proceedings aforesaid; that said proceedings as to said assessment may

be quashed, and that your petitioner may have such other relief, including costs, as he may be entitled to in the premises.

WILLIAM H. CARSON,
Attorney pro Se.

Filed July 26, 1899.

SCHEDULE A.

Schedule of Property Belonging to William H. Carson.

1. Wooden building and land 350 Main street, Brockton.
2. House and land 6 Allen street, in said Brockton.
3. House and land 8 Allen street, in said Brockton.

11 & 12 EXHIBIT B.

[SEAL.] Office of city treasurer, city hall.

BROCKTON, *Jul-* 1, 1899.

You are hereby notified that your bill for sewer rent, amount $42.53, is now due. All bills are to be paid at city hall, on or before Jul- 10, 1899. Open daily from 9 to 12 a. m. and 1.30 to 5 p. m.

W. H. EMERSON,
City Treasurer.

Extract from Ordinances.—"SECTION 4. Every person or owner of an estate who enters his particular sewer into a common sewer, shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: For unmetered water service, eight dollars; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than eight dollars, it being provided however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or owner may place at his own expense a water meter which shall be approved by the said commissioners, to measure the amount of water which does not enter the sewer.

Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the city of Brockton.

WILLIAM H. CARSON,
Attorney pro Se.

(Printed at side:) Please bring this postal when you call to pay the bill.

13 & 14 This petition was entered in our said court on the twenty-sixth day of July, A. D. eighteen hundred and ninety-nine, and upon said petition it was ordered as follows, to wit:

15-17 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Supreme Judicial Court.

On the foregoing petition it is ordered that the petitioner give notice to the said Sewerage Commissioners of the City of Brockton to appear before the justices of this court, to be holden at Boston, within and for said county of Suffolk, on the second Tuesday of August, next, to wit, August 8th, at 9½ o'cl'k a. m., by serving them with an attested copy of said petition and of this order thereon forthwith, that they may then and there show cause why the prayer of said petition should not be granted.

By the court:

JOHN NOBLE, *Clerk.*

July 26, 1899.

18 [Endorsed:] No. 6635. Wm. H. Carson, pet'r for certiorari, *vs.* Sewerage Com'rs of the City of Brockton. Filed ——. —— ——, clerk.

19 & 20 And return of service was made upon said petition by the officer serving the same in the words and figures following, to wit:

21 & 22 PLYMOUTH, *ss*:

BROCKTON, *July* 29, 1899.

By virtue hereof I, on the twenty-seventh day of July, instant, served upon the within-named Sewerage Commissioners of the City of Brockton a true and attested copy of this petition and of this order thereon by giving the same in hand to Walter F. Cleaveland, one of the said commissioners and superintendent thereof.

GEORGE A. WHEELER,
Deputy Sheriff.

Fees.

Service	$ .50
Copy	2.00
Travel	2.00
	$4.50

23 & 24 And afterwards, to wit, on the eighth day of August, in said year, said respondents appearing by F. M. Bixby, Esquire, its attorney, filed their demurrer as follows, to wit:

25 *Demurrer.*

And now come W. F. Cleaveland, A. C. Thompson, and F. Herbert Snow, sewerage commissioners of the city of Brockton, respondents, and demur to the petitioner's bill, and say that said bill and matters therein contained, in manner and form as the same are

stated and set forth, are not sufficient in law for the petitioner
26 to have his writ against the respondents; for that it does not from said petition show that the proceedings against him were unjust, unlawful, unconstitutional, or beyond the power of said defendants.

Wherefore they pray that said petition be dismissed.

By their attorney, F. M. BIXBY.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

F. M. BIXBY.

Filed August 8, 1899.

27 & 28 Whereupon a hearing was had, and the questions of law arising thereon were reserved by the justice who presided at the hearing for the determination of the full court, under the provisions of chapter 186, section 8, of the Public Statutes, in the words following, to wit:

29 & 30 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

WILLIAM H. CARSON, Petitioner for Certiorari,
v.
THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, Respondents.

Reservation.

This cause came on to be heard upon the petition and the demurrer thereto, and the petitioner disclaiming any wish to amend his petition, and the respondents disclaiming any wish to set up any defence other than their demurrer, at the request of the parties the cause is reserved for the determination of the full court upon the petition and demurrer, such order to be made as law and justice may require.

JAMES M. BARKER, *J. S. J. C.*

31 & 32 And afterwards, to wit, on the thirtieth day of January, A. D. one thousand nine hundred, the parties appeared, and it was ordered by the said supreme judicial court for the Commonwealth by its rescript as follows, to wit:

33–35 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

AT BOSTON, *January*, 1900.

In the case of William H. Carson, petitioner for certiorari, *vs.* The Sewerage Commissioners of the City of Brockton, respondents, pending in the supreme judicial court for the county of Suffolk:

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Petition denied.

By the court:

HENRY A. CLAPP, *Clerk.*

January 30, 1900.

36 [Endorsed:] 6635. No. 1473. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. William H. Carson, petn., *vs.* Sewerage Com'rs of Brockton.

37 & 38 And it was thereupon ordered by said supreme judicial court within and for the county of Suffolk accordingly.

39 & 40 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

[SEAL.] Witness Oliver Wendell Holmes, chief justice of our said supreme judicial court, at Boston, in said county of Suffolk, this 21st day of March, in the year of our Lord nineteen hundred.

JOHN NOBLE, *Clerk.*

41 In the Supreme Court of the United States.

Between—

WILLIAM H. CARSON, Plaintiff in Error,
and
BROCKTON SEWERAGE COMMISSIONERS, Defendants in Error.

Assignment of Errors.

And the said William H. Carson says that in the record and proceedings aforesaid and in making the decree aforesaid there is manifest error in this, to wit:

(1.) That by the record aforesaid it appears that it was decided in and by the said decree that the ordinance in relation to sewerage and sewerage assessments for the city of Brockton, in the county of Plymouth, Commonwealth of Massachusetts, which aforesaid ordinance was passed by the common council of said city of Brockton August 23rd, 1894, to be ordained in concurrence by the board of aldermen of the said city of Brockton, and was approved September 4th, 1894, by John J. Whipple, mayor of the said city of Brockton, said ordinance being passed by the power derived from the Statutes of 1892, chapter 254, and chapter 50 of the Public Statutes of the aforesaid Commonwealth, were valid and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid ordinance and the statutes aforesaid were repugnant to the provisions of the said Constitution that no State shall deprive any person of property without due process of law.

42 (2.) That by the aforesaid record it appears that it was decided in and by the said decree that the charges set forth in section 4 of the said ordinance, to wit, for unmetered water service, eight dollars ($8); for metered water service, thirty cents (30c.) per thousand gallons of sewerage delivered to the sewer, came within the meaning of the statutes as equitable and just, and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid charges for delivering the sewerage to the sewer were unjust and inequitable, invalid, and repugnant to the Constitution of the United States for the reason that such charges in and of themselves amounted to the taking or destruction of the property of the petitioner.

(3.) There is also manifest error in this, to wit, that by the record aforesaid it appears that the prayer of the petitioner therein mentioned for the writ of cert-orari was denied by the said decree, whereas a writ of cert-orari ought to have been thereby granted, as in the said petition prayed.

And the said William H. Carson prays that the said decree for the errors aforesaid, and others in the record, may be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he hath lost by the occasion of said decree.

WILLIAM H. CARSON,
Plaintiff in Error, pro Se.

43 [Endorsed:] William H. Carson, plaintiff in error, and Brockton Sewerage Commissioners, defendants in error. Assignment of errors.

44 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *March* 6, 1900.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of William H. Carson, pet., *vs.* Sewerage Comm'rs of Brockton, decided on the 30th day of January, 1900.

GEO. F. TUCKER,
Reporter of Decisions.

45 & 46 HOLMES, *C. J.*:

This is a petition for a writ of certiorari for the purpose of quashing the assessment of an annual charge for the use of a common sewer. The assessment was authorized by St. 1892, c. 245, § 1, and by an ordinance in pursuance of that section. It is objected that both statute and ordinance are unconstitutional.

By the statute the city council of any city, except Boston, or a town with sewers laid out under Pub. Sts., c. 50, §§ 1–3, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers to be paid by every one who enters his sewer into the common sewer. The ordinance charges for "unmetered" water service eight dollars and for "metered" water service thirty cents per thousand gallons of sewerage delivered to the sewer, but no charge to be less than eight

dollars, subject to certain possible discounts. It is argued
47 & 48 that the statute is subject to the objections which prevailed in Sears *v.* Street Commissioners, 53 N. E. Rep., 876, that the charge is a tax which properly should be borne by the public generally, and that there are no provisions for a hearing.

We are of opinion that the petitioner received a special benefit for which he might be charged, and that this case is free from the elements which in Sears *v.* Street Commissioners led to the conclusion that the petitioner was assessed without regard to the benefits received by him. No one denies that it was a special benefit to the petitioner to have the sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future; but the city by building it and receiving a part of the cost from the petitioner did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it.

The charge allowed by the act is a charge for using the sewer, a benefit distinct from that originally conferred by building it.
49 & 50 By the statute the charge must be a "just and equitable" charge. These words have been held insufficient to save the constitutionality of a statute in State *v.* Commissioners of Streets & Sewers, 9 Vroom, 190, and in Barnes *v.* Dyer, 56 Vt., 469. But the facts of those cases were too different to make them conclusive. Here the words are applied solely to those who actually use the sewer. Therefore the benefit to the parties assessed is established. The assessment in order to be equitable must be proportional to the benefit and not in excess of it. The words, in this connection, sufficiently express an intent to confine the charge within constitutional limits. They are so construed by the ordinance, for by the ordinance the charge is in proportion to the extent of the use, which is a reasonable way of estimating the extent of the benefit received. See Parker *v.* Boston, 1 Allen, 361, 367. There is no charge unless the sewer is used. The charge to the plaintiff was forty-two dollars and fifty-three cents, and therefore, under the terms of the ordinance which we have stated, must have been determined by metre.

It is said that there is no provision for a hearing. But under the ordinance the only questions are whether the petitioner's sewer enters the common sewer and what amount of sewage is shown by the metre readings to have been delivered to the sewer. If
51 & 52 the petitioner wished to be heard on either of these facts no doubt he could resort to the courts. On the rate per thousand gallons fixed by the ordinance he was not entitled to be heard. So far as appears, if he is dissatisfied with the rate, he is not obliged to use the sewer; but if he were compelled by law to use it and to pay, as now, for the use (St. 1890, c. 132), and recognizing, as we must, the possibility that, in spite of the meaning which we attribute to the statute, the rate fixed by the ordinance might be in excess of the benefit received, still, in our opinion, the act and ordi

nance would be valid, notwithstanding that mere possibility, in the absence of any allegation that the rate fixed did exceed in fact the benefit received. In cases of this sort the petitioner has no right of appeal to a jury. Howe *v.* Cambridge, 114 Mass., 388. The final decision must be somewhere, and may as well be left to the city council as to any one. New London Northern Railroad *v.* Boston & Albany Railroad, 102 Mass., 386, 387, 388. If it is left to them they are not obliged to hear the several parties who may be affected before fixing a general rate. Clearly, the rate might have been fixed by the legislature without a hearing. Parsons *v.* District of Columbia, 170 U. S., 44. And whatever differences there may be between the legislature of the State and inferior, although legislative, bodies
53–55 in cases where particular property is to be valued, still, when a uniform and self-adjusting rate is adopted under which no question as to proportion can arise, or any other question except the general one whether the rate is high, we are of opinion that the legislature has power to authorize a city council to determine that question, as it has done here. United States *v.* New Orleans, 98 U. S., 381; Railroad Commission case, 116 U. S., 307; Spencer *v.* Merchant, 125 U. S., 345, 356; Chicago, Milwaukee & St. Paul Railway *v.* Minnesota, 134 U. S., 418, 459; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 394. See further Leominster *v.* Conant, 139 Mass., 384.

If under the pretence of fixing an equitable rate the ordinance should do what amounted to the taking or destruction of property, very possibly that might afford a ground for judicial interference as in other cases where the legislature fixes rates. Smyth *v.* Ames, 169 U. S., 466; St. Louis & San Francisco Railway *v.* Gill, 156 U. S., 649; Chicago, Milwaukee & St. Paul Railway *v.* Minnesota, 134 U. S., 418. See Parker *v.* Boston, 1 Allen, 361.

Petition denied.

56 [Endorsed:] William H. Carson, pet., *vs.* Sewerage Com'rs of Brockton. Certified copy of the opinion of the supreme judicial court.

57 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Sewerage Commissioners of the City of Brockton, in our county of Plymouth, in the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, on the * first Monday of April next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of Massachusetts for the county of Suffolk, wherein William H. Carson, of said Brockton, in the county of Plymouth, in the said Commonwealth, is plaintiff in error and you are defendants in error, to show cause, if any there

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oliver Wendell Holmes, chief justice of the supreme judicial court of Massachusetts, this fifth day [SEAL.] of March, in the year of our Lord one thousand nine hundred.

OLIVER WENDELL HOLMES.

58 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

PLYMOUTH, ss: *M'ch* 17, 1900.

I hereby certify that on the seventeenth day of March, 1900, I served the within citation by delivering to Walter F. Cleavland and leaving at the last and usual place of abode of A. C. Thompson and Frank H. Snow true and attested copies of this citation, they being the sewerage commissioners of Brockton.

HENRY S. PORTER,
Deputy Sheriff.

59 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

I, John Noble, clerk of the supreme judicial court within and for the said county of Suffolk, hereby certify that the foregoing are true copies of—

I. The record in the case of William H. Carson, petitioner for certiorari, *v.* The Sewerage Commissioners of the City of Brockton, respondents, in said supreme judicial court determined, and annexed to and transmitted with said record.

II. The assignment of errors.

III. Copy of the opinion of the full court and of all the proceedings in said case, with all things concerning the same, together
60 with—

IV. The original citation.

V. The acknowledgment of service thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said court this twenty-first day of March, in the year of our Lord one thousand nine hundred.

[SEAL.] JOHN NOBLE, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Mar. 21, 1900. J. N.]

61 *Bond on Writ of Error.*

United States Circuit Court of Appeals for the First Circuit.

Blank No. 4.

Know all men by these presents that we, William H. Carson, of Brockton, in the county of Plymouth and Commonwealth of Massa-

chusetts, as principal, and Mary B. C. Carson, of said Brockton, as sureties, are held and firmly bound unto the Sewerage Commissioners of the City of Brockton, of said Brockton, in said county of Plymouth, in the full and just sum of five hundred dollars ($500.00), to be paid to the said Sewerage Commissioners of the City of Brockton, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of March, in the year of our Lord one thousand nine hundred.

Whereas lately, at a sitting of the supreme judicial court of Massachusetts for the county of Suffolk upon a petition depending in said court between the said William H. Carson, as petitioner, and the said Sewerage Commissioners of the said City of Brockton, as respondents, judgment was rendered against the said William H. Carson, and the said William H. Carson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sewerage Commissioners of the City of Brockton, citing and admonishing them to be and appear in the Supreme Court of the United States, in the city of Washington, on the first Monday of April next:

Now, the condition of the above obligation is such that if the said William H. Carson shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. CARSON. [SEAL.]
MARY B. C. CARSON. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—
——— ———.

Approved:
O. W. HOLMES, *J. S. J. C.*

Copy.
Attest: JOHN NOBLE, *Clerk.*

Endorsed on cover: File No., 17,713. Massachusetts supreme judicial court. Term No., 249. William H. Carson, plaintiff in error, *vs.* The Sewerage Commissioners of the City of Brockton, Plymouth county, Massachusetts. Filed April 11th, 1900.

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Office Supreme Court U. S.
FILED
APR 1 1901
JAMES H. McKENNEY,
Clerk.

No. 249.

Brf. of Carson Pro se.

Filed April 1st 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 249.

WILLIAM H. CARSON,
Plaintiff in Error,

vs.

THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, PLYMOUTH COUNTY, MASSACHUSETTS,
Defendants in Error.

STATEMENT AND BRIEF FOR THE PLAINTIFF IN ERROR

—BY—

WILLIAM H. CARSON, Attorney pro se.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 249.

WILLIAM H CARSON,
Plaintiff in Error.

vs.

THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, PLYMOUTH COUNTY, MASSACHUSETTS,
Defendants in Error.

Statement and Brief for the Plaintiff in Error.

STATEMENT OF THE CASE.

The petitioner in this case, William H. Carson, is now, and was at the bringing of the original petition in this case in the Supreme Court of Massachusetts, the owner of certain parcels of real estate situated on Main and Allen Streets, in the City of Brockton, County of Plymouth, of the aforesaid Commonwealth. (see Schedule A end of p. 10 Tr. Rec. Page 7).

The defendants are the Sewerage Commissioners of the aforesaid City of Brockton.

This action was begun in the Supreme Court of Massachusetts by a petition for a writ of Certiorari to quash and annul a quarterly sewerage assessment of $42.53 levied upon the property of the petitioner for the use of the public sewer of the City of Brockton (see Exhibit B, p. 11 & 12 Tr. Rec. Page 7).

The petitioner alleged in his writ the following reasons why his prayer should be granted:

1. Because said ordinance under which said tax or sewerage rental was made, does not provide for either notice of hearing of persons whose estates are affected thereby, which is contrary to, and in violation of, articles 10, 11, 15, of part I of the constitution of Massachusetts.

2. Because the method of computing such sewerage charges, which your petitioner was informed was adopted by said sewerage commissioners to wit: "For unmetered water service eight dollars ($8.00). For metered water service thirty cents per 1,000 gallons of sewerage delivered to the sewer the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than $8." is unreasonable and disproportionate, and in violation of Sec. 4, Chap. 1, part II, of the constitution of Massachusetts.

3. Because your petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax or rental for the maintenance and operation of sewers from which he receives no special benefit.

4. Because said tax or sewer rental and the ordinance authorizing the same, is in violation of the provisions of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, and is therefore illegal and void.

5. Because said tax or sewerage charge is permissible under the Constitution of this Commonwealth, or under the Constitution of the United States, only when founded upon special and peculiar benefits to the property so taxed, and then only to the amounts of such special and peculiar benefits.

6. Because, where lands have been assessed for special benefits from the construction of sewers by whose operations they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of said sewers such as to subject

them to a special tax or charge, for the reason that expenses of this kind should be made subject of general taxation.

Wherefore your petitioner prays for a writ of Certiorari to be directed to the Board of Sewerage Commissioners of the City of Brockton directing them to bring up before your Honors the several proceedings aforesaid; that said proceedings as to said assessments may be quashed and that your petitioner may have such other relief, including costs, as he may be entitled to in the premises.

WILLIAM H. CARSON,
Att'y pro se.

Filed July 26, 1899.

(See p. 10 Tr. Rec., p. 6).

To this petition the respondents through their attorney, file the following general demurrer:

DEMURRER.

And now comes W. F. Cleveland, A. C. Thompson, and F. Herbert Snow, sewerage commissioners of the City of Brockton, respondents, and demur to the petitioner's bill and say that said bill and matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the petitioner to have his writ against the respondents; for that it does not from said petition show that the proceedings against him were unjust, unlawful, unconstitutional or beyond the power of said defendants.

Wherefore they pray that said petition be dismissed.

By their Attorney,
F. M. BIXBY.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer

as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

F. M. BIXBY.

Filed August 8, 1899.

(P. 25 Tr. of Rec. page 8).

The cause came up for a hearing before a single justice of the Supreme Court and upon petitioner and respondents disclaiming any wish to amend their pleadings, at the request of petitioner and respondents the case was reserved for the determination of the full Supreme Court upon the pleadings.

The case was submitted to the full Court upon briefs, no argument being made and on the 30th day of January, 1899, the prayer of the petitioner was denied.

The respondents in this cause derived their authority to levy the assessment declared upon from the City Council of the City of Brockton. On August 23rd, 1894, the aforesaid Council of the City of Brockton passed an ordinance relating to sewers and sewerage assessments which is given in full, see p. 6 to 9, pages 2 to 5, Tr. Rec.

Sec. 4 of the aforesaid ordinance is here appended as being the vital section of the ordinance which affects this case.

> "Section 4. Every person or owner of an estate who enters his particular sewer into a common sewer, shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: for unmetered water service, $8.00; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than $8.00, it being provided, however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners

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and approved by the Mayor and Aldermen; and it being further provided that any such person or owner may place at his own expense a water meter which shall be approved by the said commissioners to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the City of Brockton." (P. 8 Tr. Rec. page 4.)

It will be seen that the City of Brockton derive their power to levy quarterly assessment declared upon under the provision of an act of the Massachusetts legislature Chapter 245 Sec. 1-4 of the acts of 1892 (see Sec. 1 of ordinance P. 6 Tr. Rec. page 3) and as these sections of the aforesaid act are the only ones that have any bearing upon this case they are hereby appended.

"Chap. 245 of the acts of 1892.

An act to give greater powers to Cities and Towns in relation to the construction of sewers.

"Be it enacted etc., as follows:

"Section 1. The city council of any city ex-
"cept Boston, or a town, in which common sew-
"ers are laid under the provisions of sections one,
"two and three of chapter fifty of the Public
"Statutes, or a system of sewerage is adopted
"under the provisions of section seven of said
"chapter, may by vote establish just and equi-
"table annual charges or rents for the use of
"such sewers, to be paid by every person who
"enters his particular sewer into the common
"sewer, and may change the same from time
"to time. Such charges shall constitute a lien
"upon the real estate using such common sewer,
"to be collected in the same manner as taxes
"upon real estate, or in an action of contract
"in the name of such city or town. Sums of

"money so received may be applied to the pay-
"ment of the cost of maintenance and repairs
"of such sewers or of any debt contracted for
"sewer purposes.

"Section 4. The mayor and alderman of
"any city and the selectmen of any town in
"which common sewers have been laid, may
"lay, make and maintain particular sewers from
"common sewers to the street line, and partic-
"ular sewers so laid shall be the property of the
"city or town.

"The owner of any estate benefited by such
"particular sewer shall pay to the city or town
"towards the cost thereof, and for the perma-
"nent privilege of using the same, such reason-
"able sum as the mayor and aldermen or select-
"men may determine; and said sum may be fix-
"ed at the estimated average cost of all such
"particular sewers, within the territory for
"which a system of sewers has been built or
"adopted. Said mayor and aldermen or select-
"men may, if requested by the owner of any es-
"tate so to do, construct a particular sewer from
"the street line to any house or building and
"charge said owner the actual cost thereof; and
"may make rules and regulations for the con-
"struction and use of all particular sewers, and
"may impose penalties not exceeding Twenty
"(20) Dollars for their violation."

In the opinion of the Court below (P. 45, 46, page 11 Tr. Rec.) reference is made to the Public Statutes Chapter fifty Section 1-3-7, but as the petitioner in this case is not contesting the first original assessment against his land for the construction of the sewer Chapter fifty of the Public Statutes has no bearing on this case. The questions in this case are first. The constitutionality of the legislative act of 1892, Chapter 245 empowering the Brockton City Government to levy an annual or quarterly charge or assessment upon the property of the petitioner for the maintenance and the operation of the sewers of said City of Brockton. Second: The validity of the ordinance of the Brock-

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ton City Government quoted above to levy such annual or quarterly rents, charges or assessments upon the property of the plaintiff in error for the operation and maintenance of the whole sewerage system of the City of Brockton. The contention of the plaintiff in error is that both statute and ordinance referred to above are unconstitutional and void as providing for neither notice, hearing, or right of appeal of the property owner and on other federal grounds more particularly set forth in the assignment of errors that follows.

ERRORS RELIED UPON.

(1) That by the record aforesaid it was decided in and by the said decree that the ordinance in relation to sewerage and sewerage assessments for the City of Brockton in the County of Plymouth, Commonwealth of Massachusetts, which aforesaid ordinance was passed by the common council of said City of Brockton, August 23, 1894, to be ordained in conference by the Board of Aldermen of the said City of Brockton, and was approved September 4, 1894, by John J. Whipple, Mayor of the said City of Brockton, said ordinance being passed by the power derived from the statute of 1892, Chapter 245 and Chapter fifty of the Public Statutes of the aforesaid Commonwealth, were valid are not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid ordinance and the statutes aforesaid were repugnant to the provisions of the said Constitution that no state shall deprive any person of property without due process of law.

(2) That by the aforesaid record it appears that it was decided in and by the said decree that the charges set forth in section 4 of the said ordinance, to wit, for unmetered water service Eight dollars ($8.00); for metered water service thirty (30ct.) cents per

thousand gallons of sewerage delivered to the sewer, came within the meaning of the statutes as equitable and just, and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid charges for delivering the sewerage to the sewer were unjust and inequitable, invalid, and repugnant to the Constitution of the United States for the reason that such charges in and of themselves amounted to the taking or destruction of the property of the petitioner.

(3) There is also manifest error in this, to wit, that by the record aforesaid it appears that the prayer of the petitioner therein mentioned for the writ of certiorari was denied by the said decree, whereas a writ of certiorari ought to have been thereby granted, as in the said petition prayed.

ADDITIONAL ASSIGNMENT OF ERRORS.

(4) The Court erred in holding that the language in the ordinance or the statute referred to provided either in express terms or by implication for notice or hearing to the petitioner whereas, it ought to have been held that as the ordinance and the statute complained of did not in express language or by fair implication provide for notice and hearing to the petitioner at some stage of the proceedings before the said charge or assessment became a lien upon the property of the petitioner, that such failure to provide for notice and hearing was contrary to the provisions of Section I of the Fourteenth Amendment of the Constitution of the United States and therefore illegal and void as a taking of property without due process of law.

(5) The Court erred in ruling that the acts of 1892, Chapter 245 were constitutional, for by such acts the City council of Brockton were empowered to fix an annual rent charge or assessment for the use of the sewers of the City of Brockton which should be-

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come a lien upon the property of the petitioner, and it further empowered them to "Change the same from time to time" whereas it should have been held that the language of the statute was unconstitutional and void for the reason that it made no fixed and certain charge and gave to the City Council of Brockton the power to change such annual or quarterly charges at any time or times irrespective of any special and peculiar benefit accruing to the petitioner's property which is repugnant to the provision of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall deprive any person of life, liberty, or property without due process of law.

(6) The Court erred in holding that the words "Just and equitable" as used in section 1 of the acts of 1892, Chapter 245 were sufficiently certain as a standard of assessment, whereas the Court should have held that as the words import no special limitations they cannot be regarded as laying down a rule or standard by which the benefit to the petitioner could be proportioned to the amount of the assessment charge, and that the words aforesaid are repugnant to the provisions of the Constitution of Massachusetts, and to the Fourteenth Amendment of the Constitution of the United States.

(7) That by the record aforesaid it appears that it was decided in and by the said decree that the ordinance in relation to sewerage and sewerage assessments for the City of Brockton and of the aforesaid acts of the State Legislature in regard to sewerage and sewerage assessments, that the keeping of the sewer in condition for use by such further expenditure as was necessary by the City was a further and special benefit to the property of the petitioner for which the property of the petitioner could be assessed by the City of Brockton whereas, it should have been held, that the petitioner having paid for the original construction of the sewer he was entitled to the use of the same, and that connecting his property with the sewer was not such a further and

special benefit as would warrant the City in levying an assessment for its use, and as such assessment became a lien upon the property of the petitioner it amounted to unjust, inequitable and unequal taxation and was repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States.

(8) That by the aforesaid Record it appears that it was decided in and by the aforesaid decree that the assessment of $42.53 made upon the property of the petitioner by the Brockton City Government under the authority derived from the ordinance aforesaid and of the acts of 1892, chapter 245 for the maintenance and operation of the sewers of the City of Brockton was not a subject for general taxation, and was therefore constitutional, and not repugnant to the constitution of Massachusetts or of the Fourteenth Amendment of the Constitution of the United States, whereas it should have been held that such assessment levied against the property of the petitioner by the Brockton City Government was discriminating against the petitioner's property by levying an assessment to pay for the maintenance and operation of the whole sewerage system of the aforesaid City of Brockton, which is a tax that should be borne by the whole people, and that as such tax can be enforced by the sale of the plaintiff's property, it is contrary to the provisions of the constitution of Massachusetts and on the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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POINTS.

I.

(1.) Where lands are to be assessed for local improvement and such improvement is not made compulsory by the State Legislature, notice to the property owner and provision for a hearing is essential to the validity of the act. In such cases the land owner has a right to be heard.

(2.) The act of 1892, Chapter 245 is void as providing neither notice or hearing to the land owner who is to be assessed.

(3.) The words in the statute of 1892, Chapter 245, Section 1, authorizing the City Council of Brockton to change the rates of sewerage charges or assessments from time to time clearly manifest an intention on the part of the legislature to assess such property connected with the sewer without regard to benefits; and the statute is therefore unconstitutional and void.

Norwood vs. Baker, 172 U. S. 282;
(Full opinion of Court and cases cited.)
Hager vs. Reclamation District, 111 U. S. 701-709;
Spencer vs. Merchant, 125 U. S. 345-346;
Fall Brook Irrigation District vs. Bradley, 164 U. S. 112 and cases cited.
Stewart vs. Palmer, 74 N. Y. 189;
Davidson vs. New Orleans, 96 U. S. 97;
Thomas vs. Gain, 35 Michigan 155-156.

II.

(1.) The words "just and equitable" as they appear in Section 1, act of 1892, Chapter 245 of the Massachusetts statute relating to sewers and sewerage assessments furnishes no legal standard of assessment, as it

does not measure or limit either the amount of the assessment or the benefit to be received. The words are vague, uncertain, and import no special limitation.

Barnes vs. Dyer, 56 Vermont 471;
State vs. Newark, 8 Vr. (N. J.), 415;
New Brunswick Rubber Co. vs. The Commissioners etc., 9 Vr. (N. J)., 190;
Hammett vs. Philadelphia, 65 Penn. St. 146;
State vs. Mayor etc. Paterson, 8 Vr. (N. J.) 412;
Bogert vs. Elizabeth City, 27 N. J. Eq. 568, 569;
Washington Avenue case, 69 Pennsylvania St. 352.
State Evans, Pros., vs. Mayor, etc. of Jersey City, 6 Vr. (N. J.) 381.

III.

(1.) The maintenance and operation of a sewer, the benefit of which accrues to the whole city in which it is located, irrespective of individual ownership of lands, is a subject for general taxation on personal as well as real estate, and is not a subject for a special assessment.

Beals vs. Street Commissioners of Boston, 53 North Eastern Rep. 876;
Hammett vs. Philadelphia, 65 Penn. St. 146;
Washington Avenue case, 96 Penn. St. 325
App of Williamsport 41 Atl. Rep. 476;
Dietz vs. Neeneh, 91 Wisconsin 422-427;
Dyer vs. Framingham, 70 Maine, 527;
Hanscom vs. Omaha, 11 Nebraska, 37;
McClusky vs. Chamberlain, 37 N. J. L. 388;
Erie vs. Pennsylvania, 148 Penn. St. 348;

IV.

(1.) Where lands have paid an original assessment for special benefit for the construction of all sewers

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by which they are affected it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of such sewers as to subject them to a second special assessment.

(2.) Taxing the property of the few for a benefit that accrues to the whole city is unequal, unjust, and is a discrimination against the land of those thus assessed. When such tax or assessment becomes a lien upon the lands, it is a taking of property without due process of law and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Sears vs. Boston, 53 N. E. Rep. 876;
Wright vs. Boston, 9 Cushing, 233-240;
Norwood vs. Baker, 172 U. S. 282-3;
Weed vs. Boston, 172 Mass. 28;
Constitution of Massachusetts, Part II, Chap. 1, Art. 4;
Cooley on Taxation, second ed. page 663;
State Agents vs. Newark, 37 N. J. L. 416 (cases cited.)
Dorgan vs. Boston, 12 Allen 223 pp. 237-238.

V.

Where the record discloses terms or amounts of a tax assessment or servitude against lands to be assessed and such tax or assessment in and of itself amount to the taking or destruction of such property, it is against the provision of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the law.

Smyth vs. Eames, 169 U. S. 466;
St. Louis & San Francisco Railway vs. Gill, 156 U. S. 649;

Chi. Mil. & St. Paul R. R. vs. Minnesota, 134 U. S. 418.

BRIEF AND ARGUMENT.

This case is, as far as I have been able to find in the books, the first of its kind that has ever come before this court. It is not a case of a first original assessment for the construction of a sewer; but is one of continuing quarterly assessments levied upon the lands of the plaintiff in error for the maintenance and operation of the whole sewerage system of the City of Brockton. As the power derived from the statute and ordinance quoted in the statement of the case empowers the City of Brockton to make such charges and lien upon the estate of the plaintiff, and as such lien can be enforced by a sale of the plaintiff's property, it is the contention of the plaintiff in error that all phases of this case and all points involved in it must resolve themselves into a federal question as a taking of property without due process of law, and contrary to the provisions guaranteed under the Fourteenth Amendment of the Constitution of the United States.

In considering the reasoning of the court below as to how they arrived at their conclusions of law, it would seem that in the decision of Seers vs. Street Commissioners of the City of Boston 53 N. E. Rep. 876, the court lay down one law for Boston and, in the case now before this court, which was heard some months after the Seers case, the court by its ruling lay down another law for the City of Brockton.

Referring to the opinion of the court below in this case P..47-48 page 12 Tr. Rec. we find the following:

> "We are of opinion that the petitioner received a special benefit for which he might be

charged, and that this case is free from the elements which in the Seers vs. Commissioners led to the conclusion that the petitioner was assessed without regard to the benefit received by him. No one denies that it was a special benefit to the petitioner to have the sewer built in front of his land. That benefit was a probability that the sewer would be available for use in the future; but the City, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it." Par. 47-48 page 12 Tr. Rec.

Herewith is appended the language of the court in Seers vs. Commissioners of the City of Boston:

"Where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston such as to subject them to a second special assessment; expenses of this kind should be made the subject of general taxation. The grouping of these various expenses would seem to make it difficult, if not impracticable, under this statute, to make assessments of special and peculiar benefits directly received by particular estates from the construction of sewers near them. And again:

"The benefits to be considered in taxing such estate are not in terms those that are special and peculiar, but, so far as the language goes, may be those that it receives in common with the other estates in the City, and with the inhabitants generally. The fact that the charges to

> be determined are for the construction, maintenance and operation of the sewerage works of the whole City gives some force to the possibility of a construction which includes all benefits; but, whether this construction should be adopted or not, the charges may be determined on any grounds which the Street Commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits. This fact, in itself, is enough to bring the statute within the prohibition of the Constitution inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law."
>
> Seers vs. Street Commissioners of the City of Boston, 53 N. E. Rep. 876, (1899).

Continuing with the points passed upon in the opinion of the court below we come to the next paragraph (49-50, page 12 Tr. Rec.)

> "The charge allowed by the act is a charge for using the sewer,—a benefit distinct from that originally conferred by building it. By the statute the charge must be a 'just and equitable' charge. These words have been held insufficient to save the constitutionality of a statute in State vs. Commissioners of Streets and Sewers, 9 Vr. 190, and in Barnes vs. Dyer, 56 Vt. 469. But the facts in these cases were too different to make them conclusive."
>
> First part of P. 49-50 page 12 Tr. Rec.

What the court meant by the word in the last sentence quoted above "Too different to make them conclusive" is vague and equivocal as the words used in the c[illegible] referred to in Barnes vs. Dyer 56 Vt. page 471 a[illegible]entical. There can be no misconception as to their meaning; and as their constitutionality was questioned in the above mentioned case and the plaintiff in

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error of this case relied in the lower court upon those identical words, and assigned them in this court as error for the reason that they are not sufficiently certain as a standard of assessment the above mentioned case is given here at length as the opinion also embraces the ruling of the court in State vs Commissioners of Streets and sewers 9 Vr. N. J. 190.

Barnes vs. Dyer 56 Vt., page 471, Par. 3.

> 3. "Special benefit to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only solid foundation upon which local assessments can rest."
>
> The cases differ somewhat as to how the benefit may be determined, whether by the frontage or superficial area; but no such question arises here. The only question here is, whether the phrase, "as they shall deem just and equitable", is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the premises fronting on the improved sidewalk, it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnishes no certain legal standard of assessment. Did the court of common council determine the amount of this assessment in view of the benefits to the abutting land; *or* of its value; *or* of the personal convenience to the defendant; *or* of the ability of the defendant to pay; *or* of all these combined? Who can say? Why might they not under this clause assess one man in one view, and another in another view? "Just and equitable" in respect to what? The words import no special limitation.
>
> In State vs. Newark, 8 Vr. (N. J.) 415, (S. C., 18 Am. Rep. 729), the Chief Justice of New Jersey says: "The only safe rule is, that the statute authorizing the assessments shall itself

fix either in terms or by fair implication the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected."

The act in question makes no express allusion to assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet, as we have seen, the right to assess at all depends solely on benefits, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land specially benefited.

In New Brunswick Rubber Co. vs. The Commissioners of Streets and Sewers, 9 Vr. (N. J.) 190, (S. C., 20 Am. Rep. 380), it was decided that, where a statute authorized commissioners to assess the cost of a sewer upon lands benefited thereby in such proportion as they should deem just and equitable, no valid assessment could be made under the statute, as it failed to determine the mode of distributing the burden. Knapp, J., in delivering the opinion of the court, says: "In State vs. Mayor etc., of Paterson, 8 Vr. (N. J.) 412, an assessment, certified to have been equitably made, was set aside as governed by no rule. It is not perceived how a legislative enactment, which provides no rule or standard for making an assessment for a public work, can have higher claim for validity."

That case may be regarded as extreme. A much stricter rule was adopted than is contended for here.

In our statutes providing for general taxes, a fixed standard of apportionment has always been adopted, securing uniformity, as far as practicable, in theory at least, in respect to persons and property within the jurisdiction of the body imposing the taxes.

There is greater reason for adhering to this rule in respect to provisions for special assessments. When the money of the few is taken for the benefit of the whole, it is in substance the exercise of despotic power. It is justice when an equivalent is given. In the case of a local improvement, there is an equivalent for the assessment when it only equals the special bene-

fit to the property benefited. But it is the right of the citizen to have the law, which reaches into his pocket specially, so guarded as to secure him approximate justice according to legal and constitutional principles. The language of Judge Agnew in the Washington avenue, 69 Penn. St. 352, is pertinent: "In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers, without perceiving the progression, until the usurption becomes so firmly fixed by precedents it seems to be impossible to recede or to break through them."

Our constitution provides that "every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection."

This is less restrictive than the constitutions of many States; but the cases which have established the rule that the statute authorizing an assessment must fix the legal standard to which it shall be made to conform, have not turned on the phraseology of constitutional provisions. It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so there is no protection against arbitrary injustice in the imposition of taxes. To secure this protection courts have held that legislative enactments, must set up a standard, fix a rule, to be conformed to as a guide in all cases, an uniform, certain rule, so far as reasonably practicable, and not susceptible to different applications to different individuals to the class to which it applies. If the enactment fails in this regard, it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which in a constitutional government are designed to protect the individual against injustice and oppressioin.

We think the act in question failed to set up a standard by which all assessments for sidewalks in Vergennes must be made; that the

> words, "just and equitable," do not import, with reasonable certainty, a limitation to particular benefits to property benefited. We do not know but that one member of the common council construed the words as applying to one consideration, and another member to a different consideration; nor that any of them limited the consideration to benefits. In short the enactment was inadequate to the purpose designed by it.
>
> This view renders it unnecessary to pass upon the other points of defence.
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> Judgment reversed and cause remanded.

Referring now to Par. 51-52 page 12 printed Tr. Rec. we find in the opinion of the court below the following:

> "It is said there is no provision for a hearing, but under the ordinance the only questions are whether the petitioner's sewer enters the common sewer, and what amount of sewerage is shown by the meter reading to have been delivered to the sewer, if the petitioner wished to be heard on either of these facts no doubt he would resort to the courts."

Pausing here to consider such part of par. 51-52 as has been quoted, it would seem, from the language used, that the court entirely overlooked the nonprovision for a hearing in the statute, or ignored that fact entirely. Of course, if the statute is unconstitutional and void the ordinance of the City of Brockton can have no higher validity.

> "If the petitioner wished to be heard on either of these facts, no doubt he could resort to the courts." Par. 51-52 page 12 Pr. Tr. 3rd sentence in paragraph.

This sentence of the opinion of the court seems to convey the very doubt that exists that the plaintiff in error could demand, as a right, a hearing; and if a

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hearing were demanded the language of the court carries with it by fair implication a doubt as to whether the plaintiff might or might not be granted a hearing. Be that as it may, the plaintiff in error should have had a right to a hearing granted him by the legislative act and not by favor or courtesy of the court. Stewart vs. Palmer 74 New York page 188 second paragraph.

> "I am of the opinion that the Constitution sanctions no law imposing such assessments, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law that the assessment has, in fact, been fairly apportioned. The Constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice." Stewart vs. Palmer 74 New York, page 188.

Continuing with the opinion of the court below par. 51-52 page 12 Tr. Rec. fourth sentence is as follows:

> "On the rate per thousand gallons fixed by the ordinance he was not entitled to be heard."

This ruling is contrary to well established law: Smith vs. Eames 169 U. S. 466, St. Louis & San Francisco R. R. vs. Gill, 156 U. S. 549; Chicago, Milwaukee and St. Paul Railway vs. Minnesota, 134 U. S. 418 and cases cited.

Continuing to quote from the opinion of the court below par. 51-52 the first half of the next sentence is as follows:

> "So far as appears, if he is dissatisfied with the rate he is not obliged to use his sewer".

Remark upon the sentence quoted above is hardly necessary, the assertion is frivolous. It seems strange that such a sentence should have crept into the opinion by the Chief Justice of the highest court of Massachusetts, neither is it necessary to quote a law to controvert it. It is, of course, a matter of common knowledge that the Board of Health or Police have power to compel those on the line of the sewer to connect with the sewer when it is deemed necessary for the public health or welfare.

In the same paragraph 51-52 page 13 Pr. Tr. Rec. end of fourth line the court uses the following language

> "The final decision must be somewhere and may as well be left to the City Council as to anyone."
>
> New London Northern Railroad vs. Boston and Albany Railroad 102 Mass. 386, 387-388.
>
> If left to them they are not obliged to hear the several parties who may be affected before fixing a general rate, clearly the rate might have been fixed by the legislature without a hearing.
>
> Parsons vs. District of Columbia 170 U. S. 44.

The case of Parsons vs. District of Columbia cited by the court below is so perfectly familiar to this court that only brief reference will be made to it. This was the case of a laying of a water main tax under an act of Congress providing that all assessments for laying water mains in the District of Columbia should be at a specified rate per front foot on abutting lots, and giving commissioners power to lay water mains wherever they deemed necessary for the public safety, comfort or health. The law under which this case was decided is well settled, and is as distinctly different from the law governing the case of a special assess-

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ment for a local improvement, especially an annual sewerage charge or quarterly assessment for the use of the sewer, as are the laws that control the collection of poll tax or special licenses granted for the prosecution of business or trade. The Parsons vs. District of Columbia case was a case of urgency, of absolute necessity, and not a case of special assessments where special and peculiar benefits to the property owner were to be considered. The language of Mr. Justice Shiris defines the difference between a tax or assessment prescribed by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under limited and delegated authority.

> "There is a wide difference between a tax or assessment prescribed by a legislative body having full authority over the subject, and one imposed by a municipal corporation, acting under a limited delegated authority, and the difference is still wider between a legislative act making an assessment, and the action of mere functuaries whose authority is derived from municipal ordinances,"

and further on in the opinion, last sentence in second succeeding paragraph:

> "Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes, in its nature, judicial in such a sense that the property owner is entitled to a hearing or to notice and opportunity to be heard."
> Parsons vs. District of Columbia 170 U. S. 44.
> Spencer vs. Merchant, 100 N. Y. 585.
> Hagar vs. Reclamation District 108, 111 U. S 701.

Continuing with the opinion of the court below paragraph 53-55 page 13 Tr. Rec. is as follows:

> "And whatever difference there may be between the legislature of the state and inferior, although legislative, bodies in cases where particular property is to be valued still, when a uniform and self adjusting rule is adopted under which no question as to proportion can arise or any other question except the general one whether the rate is high, we are of opinion that the legislature has power to authorize a City Council to determine that question as it is done here. United States vs. New Orleans 98 U. S. 381; Railroad Commissioners case 116 U. S. 307; Spencer vs. Merchant; 125 U. S. 345-356; Chicago, Milwaukee and St. Paul Railway vs. Minnesota 134 U. S. 418, 459; Regan vs. Farmers Loan and Trust Company 154 U. S. 362, 394; see further Leominster vs. Colin 139 Massachusetts 384."

The plaintiff in error respectfully submits that the cases cited by the court below in its opinion as upholding the proposition of law contained in par. 53-55 page 13 pr. Tr. Rec. do *not* uphold the proposition laid down by the court. The court lost sight of the fact that notice and hearing is *always* provided for, and, while the cases in the United States reports cited above are so familiar to this court that an extended discussion is unnecessary, I will only refer to such part of each case as bear upon the question of notice and hearing. The case of U. S. vs. New Orleans 98 U. S. 381 will be passed by with the remark that as this case was for the recovery of a judgment against the City of New Orleans for bonds and coupons issued by the said City of New Orleans that the law is entirely inapplicable to the case at hand, and we fail to see why the court below should have cited it as upholding their opinion.

The next case, Railroad Commission cases 116 U. S. 307, was a case to pass upon the power of railroad commissioners to fix or limit charges under power derived by an act of legislature of the state of Mississippi.

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The law in such cases is so entirely different from that governing the case now before this court that we are at a loss to understand why the court below should have cited this case when there were such a vast number of cases to select from having a direct bearing upon the case in hand. The distinction between the law governing interstate commerce and the law which regulates the laying of assessments for special and peculiar benefits is marked, and as we before stated, the powers of commissioners appointed by a legislature with absolute power to regulate charges and reform abuses in interstate commerce, always providing they keep, within constitutional limitations; is a law unto itself, and is distinct and apart from that which controls assessment for local improvements where special benefits and proportion are to be considered.

The next case cited by the court below in its opinion, is the well known case of Spencer vs. Merchant 125 U. S. 337 that was a case cancelling an original assessment imposed under Chapter 217 laws of 1869 as amended by Chapter 619 of the laws of 1870, which act, so far as it authorized assessment in question was said to be unconstitutional and void as depriving the parties assessed of their property without due process of law, by the Court of Appeals of the State of New York. The case came before this Court on the question of validitating a void assessment without giving the owners of the land assessed an opportunity to be heard upon the assessment.

From the opinion of the Court as voiced by Mr. Justice Gray is quoted the following: Fourth Paragraph.

> "The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts, upon the

ground that it acted unjustly or without appropriate and adequate reason;" and again middle of lower paragraph, first column, page 345:

"A hearing is given by the act as to the apportionment among the land owners which furnishes them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent." And again end of same paragraph:

"The land owners were given a hearing, and so there was no constitutional objection in that respect nor was that hearing illusory. It opened to the land owner an opportunity to assail the constitutional validity of the act under which a loan and apportionment could be made, and that objection failing, it opened the only other possible question, of the mode and amounts of the apportionment itself."

The next case cited in the opinion of the court below is that of Regan vs. Farmers Loan and Trust Company. Remarks quoted above in reference to railroad Commission cases 116 U. S. will apply also to the case of Regan vs. Farmers Loan and Trust Company.

The statute of 1892, Chapter 245 Section 1, is unconstitutional and void and repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States for the following reasons: First, As providing for neither notice, hearing, nor appeal of the owner of land to be assessed.

Second, that the words "just and equitable" as used in the statute furnishes no legal standard by which to apportion the amount of the assessment in proportion to the amount of special and peculiar benefits to be received. The words are vague, uncertain and import no special limitation.

Third, the power given by the statute to the City Government of Brockton that "they may change the rate from time to time" clearly shows an intention to place in the hands of the common council an absolute power to charge what, in their opinion, they may deem proper, without regard to its reasonableness or the

special and peculiar benefits to be derived from such charges, and is conclusive evidence of the intention of the legislature to ignore the Constitutional right of the land owner.

The sewerage commissioners of the City of Brockton, acting as a quasi-judicial body, are empowered to levy a quarterly assessment, or rental, on every estate connected with the sewer. Such assessment becomes a lien upon the estate, and the amount of such assessment can be collected by the sale of the property thus assessed. Every property owner should be given an opportunity to be heard, before his estate is doomed to pay a tax; yet the Brockton city ordinance relating to sewers, or the statute under which it was framed, does not provide for either hearing or notice, and the determination of the board of sewerage commissioners, is made final. No appeal to a jury or other tribunal is provided. The petitioner is doomed unheard, and without appeal, to be deprived of his property to the extent of the assessment without due process of law, in violation not only of the Constitution of Massachusetts but also of the Fourteenth Amendment of the Constitution of the United States.

It has been repeatedly held that a statute which regulates assessment proceedings, and fails to provide an opportunity for a hearing, is invalid under the Constitution of the United States, and under the constitutions of most of the states of the Union.

> "Upon this subject there is a general concurrence of authorities in the affirmative. It is a fundamental rule that in judicial or quasi-judicial proceedings, affecting the rights of the citizen, he shall have notice, and be given an opportunity to be heard, before any judgment decree, order or demand shall be given and established against him. Tax proceedings are not, in the strict sense, judicial, but they are quasi-judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when

the conclusive steps are to be taken. Provision for notice is, therefore, part of the 'due process of law' which it has been customary to provide for those proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended, or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

Cooley on Taxation, 2d Edition, page 363;
Constitution of Massachusetts, Part First, Art. XII;
Constitution of the United States, Fourteenth Amendment Sec. I;
Parsons vs. District of Columbia, 170 U. S. 45, 52, 54;
Hagar vs. Reclamation District, 111 U. S. 701, 709;
New Brunswick Rubber Company vs. Commissioners of Streets, 9 Vroom 190;
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112;
English vs. Wilmington 37 Atlantic Rep. 158, 162;
Stewart vs. Palmer, 74 N. Y. 183;
Dietz vs. Neenah, 91 Wis. 422, 427;
New London Northern Railroad Co. vs. B. & A. R. R. Co., 102 Mass. 386;
Remsen vs. Wheeler, 105 N. Y. 579;
Matter of Trustees of Union College, 129 N. Y. 308;
Butler vs. Supervisors, 26 Mich. 22;
Thomas vs. Gain, 35 Mich. 156;
Campbell vs. Wiggins, 83 Ind. 473;
Davidson vs. New Orleans, 96 U. S. 97.

"The general rule is that the method pursued should be appropriate to the case, adapted to the end to be attained, just to the parties, with notice and an opportunity to be heard before an appropriate and impartial tribunal."
Cooley Constitutional Limitation (6th Ed.) 694-695:

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Mills Eminent Domain, § § 84, 85;
Lewis Eminent Domain, §313;
Buffalo Boyau B. & C. R. R. Co., vs. Ferris, 26 Tex. 599.

The constitutional validity of a statute is to be tested by what may be done under it, not what has occurred.

Stuart vs. Palmer, 74 N. Y. 188, Earl, Judge, rendering the opinion said: "It matters not upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done." This language is quoted with approval in Gilman vs. Tucker, 128 N. Y. 190 at 200.

Colon vs. Lisk, 157 N. Y. 188 at 194-5.

"In discussing the constitutionality of this Act, it is to be remembered that the question is to be determined not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority."

Stuart vs. Palmer, 74 N. Y. 183.
Gilman vs. Tucker, 128 N. Y. 190-200.
Brown vs. City of Denver, 7 Col. 305 at 312.
Dexter vs. City of Boston, Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1900. North-East Reporter, Vol. 57, No. 5, June 15, 1900, page 379 at 380.
Collins vs. New Hampshire, 171 U. S. 33, 34.
Henderson vs. Major, 92 U. S. 268.
Minnesota vs. Barber, 136 U. S., 313 at 319.

In Davidson vs. New Orleans, *supra, the* language of the court is as follows:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in

the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It cannot be said, that because the land of the plaintiff in error was connected with the sewer at his request that he waived his right to object to the constitutional validity of the ordinance or statute.

New Brunswick Rubber Company vs. Commissioners of Streets and Sewers, page 197.

"Connecting with the Sewers cannot be regarded as an acquiesence on their part; their right so to connect is not made to rest on condition of paying the assessment; the consent of the commissioners and their own willingness is all that is needed for that. It would be as unreasonable to hold a man to the payment of an illegal assessment on his lands for the paving of a street, because, after the assessment, he drove his carriage over the pavement, as to oblige him to pay an improper assessment for building a sewer, for the reason that he had connected the land so assessed with the sewer, the improvement is made for the public benefit, and the use of it the prosecutors, as part of the public are entitled to share."

A land owner cannot be held to pay an improper assessment, because he has purchased the land subject to such assessment, and assumed to pay it as part of the consideration.

State, Evans, pros., vs. Mayor Est. of Jersey City, 6 Vroom 381.

All that the silence, acquiesence and acts of the prosecutors can bind to is submission to a proper tax or assessment when legally imposed for the payment of their just proportion of the reasonable costs of the improvement.

Many other reasons were presented and urged on the argument for setting aside the assessment, but it is deemed unnecessary to consider

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them as the assessment must be set aside for the reasons above stated.
New Brunswick Rubber Co. v. Com. of Streets and Sewers, 9 Vr. (N. J.) 19.

NATURE OF THE SEWERAGE CHARGE.

The term "sewerage rental", as used in the ordinance relating to sewerage and sewerage assessments of the City of Brockton, is, in reality, a tax, and, in so far as it relates to the maintenance and operation of the sewerage works, which include, among other items, the salaries of the employees and all other expenses for the operation of the sewer department of the City of Brockton, is, from its nature, a tax imposed for the benefit of the whole City of Brockton, irrespective of individual ownership of land, and constitutes a public burden, and should be imposed as a general tax on personal as well as on real estate. That such expenses are proper subjects for general taxation, and not for special assessments, see

Beals v. Street Commissioners of Boston, 53 North-Eastern Rep. 876;
Hammett v. Phila., 65 Pa. St. 146; Washington Ave. 69 Pa. St. 352; App. of Williamsport, 41 Atl. Rep. 476;
Dietz v. Neenah, 91 Wis. 422, 427;
Dyar v. Farmington, 70 Me. 527;
Hanscom v. Omaha, 11 Neb. 37.

In Erie v. Russell, 148 Penn. St. 384, the court says, "Why should a sewer, demanded and constructed by the city, and paid for by assessments on the property fronting on the street under which it is laid, be maintained and reconstructed, on the order of the municipality, at the expense of such property? It was made, by the action of the city, a part of its system of sewerage, which is as necessary for the health

of its people as its paved streets are for their use. Its construction was at the expense of the abutting property, and properly so, in discharge of the obligation arising from particular benefits conferred. It is now a constituent of the general system ordained by the city for the convenience and health of its inhabitants. This system confers benefits which are general. It is a public necessity, and the expense of maintaining it should be provided for by general taxation."

See Child v. Boston, 4 Allen, 41, 52;
Emery v. Lowell, 104 Mass. 13-16;
Stewart vs. Palmer, 74 N. Y. 183;
Norwood v. Baker, 172 U. S. 282-3;
New Brunswick Rubber Co. v .Street Comrs. 9 Vroom, 190;
Barnes v. Dyer, 56 Vt. 469;
Thomas v. Gain, 35 Mich. 155-156;
Dexter vs. Boston, 57 N. E. Rep. 379.

The assessment is a tax, and takes its essential character from the powers of government under which it is made. If this assessment can be imposed arbitrarily, simply by calling it a rent, then every assessment for local improvement can be treated in the same way, and the decision in Weed v. Boston, 172 Mass. 28, holding a sewer assessment unconstitutional, because unreasonable, could have been easily avoided by calling it a rent for the use of the sewer.

The term sewerage rental or assessment is applied to impositions of this nature, because they are laid in respect to particular estates, to distinguish them from the ordinary ratable taxes. But both terms are assessments in respect to the mode of ascertaining the amount to be paid; and both are taxes in respect to the power under which they are imposed.

In Mount Auburn Cemetery v. Cambridge, 150 Mass. 12, the court, in speaking of an assessment for a common sewer, under Public Statutes, c. 50, says, page 14: "It it a public tax, in the sense

that it is levied for a public object; it is a local tax, in the sense in which most public taxes are local, that it is limited to a certain locality; it differs from ordinary public taxes, in that it is not levied upon the polls and estates within a municipality or district in respect of public or common benefits, but upon particular lands in respect of a particular benefit received by them from the excution of a public object. Taxes voted by towns and cities for public ways and common sewers are for public objects, and are, in every sense, public taxes.

Wright v. Boston, 9 Cush. 233-240;
Boston v. Boston & Albany R. R., 170 Mass. 95-98.

As a general tax or assessment laid primarily for the benefit of all the inhabitants of the City of Brockton, it is invalid. All taxes, whether general taxes or special assessments, are required by the Constitution to be proportional and reasonable.

Constitution of Mass., Part Second, Chap. I., Art. IV.;
Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12-14.

The distinction between general taxes and special assessments is based on the incident of the chief benefits of the expenditure. It is well established that a special assessment upon particular estates is permissible, under the Constitution of this Commonwealth, and under the Constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to the amount not exceeding such special and peculiar benefits.

Boston v. B. & A. R. R. Co., 170 Mass., pages 95, 98;
Weed v. Boston, 172 Mass. 28;

Proprs. Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12-14;
Norwood v. Baker, 172 U. S. 282-3;
Sears v. Boston, 53 N. E. Rep. 876;
Wright v. Boston, 9 Cush. 233-240;
Hammett v. Philadelphia, 65 Pa. 146;
Bogert v. Elizabeth, 27 N. J. Eq. 568-569;
City of Erie v. Russell, 148 Pa. St. 384, 386;
Appeal of City of Williamsport, 41 Atlantic Rep. 476;
Cooley on Taxation, 2d ed., page 663;
Desty on Taxation, Vol. I., pages 26, 30, 275;
Dyar v. Farmington Village Cor., 70 Maine, 527;
Hanscom v. Omaha, 11 Neb. 37;
Baltimore v. Huges, 1 Gill. and J. 492;
Howes v. Glas. 48 N. E. 922;
McClusky v. Chamberlain, 37 N. J. L. 388;
Agens v. Newark, 37 N. J. L. 416;
State v. Chamberlain, 8 Vroom, 388;
Hewes v. Momence, 45 N. E. 302.

A general tax for an improvement of general benefit, to be proportional and reasonable, must be assessed upon all estates, real and personal, within the municipality benefited.

Wright v. Boston, 9 Cushing, 233-240;
Northampton v. County Commissioners, 145 Mass. 108-109;
Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12, 13;

The maintenance and operation of the sewerage works include the expenses of the sewerage department and the salaries of its employees, and are in no sense special and peculiar benefits to land owners, but are public works of the first importance to, and necessary for each inhabitant of the City of Brockton, irrespective of his ownership of land. Such current expenses are as properly a part of the running expenses of the city, to be raised by general taxation, as are the charges for street cleaning, lighting or police, or any other muni-

cipal function which relates to the health and comfort of the citizens, and which benefits one and all equally.

Dogan v. Boston, 12 Allen, 223, pp. 237-238.

The quarterly assessment or rental charge for maintaining and operating the sewers of the City of Brockton throws the burden upon a comparatively few of the land owners of the city for a benefit that is primarily public in its nature. Such improvements that accrue to every inhabitant of the city are a subject for general taxation.

> In Wright v. Boston, 9 Cushing, page 340, Chief Justice Shaw says: "The principle generally adopted here is that public improvements, although local, must be paid for at the public expense."
>
> In Child v. Boston, 4 Allen, 41, Judge Hoar says, at page 52: "But after a common sewer is built, and until some change in its location or construction is directed by the board of alderman, its care and maintenance devolve wholly upon the city, who provide for keeping it in order through such agents and officers as they choose to select and appoint. The superintendent of common sewers, the officer designated for this purpose in the City of Boston, is chosen by the concurrent vote of two branches of the city council, is removable at their pleasure, and receives such compensation as they determine. City Ordinances of Boston (ed. of 1856), 487. * * * The charge of sewers and drains is not an obligation imposed upon the city by legislative authority, exclusively for public purposes, and without its corporate assent. It was voluntarily assumed, by the acceptance of the act conferring the power."

The distinction between the special assessment which can be imposed upon abutters and the general tax which must be borne by all, is recognized both by the economists and the courts of other states, irrespective of

constitutional restrictions, and such charges as the annual operating expenses of sewerage works are uniformly declared appropriate objects for general taxation, but not for special assessments.

Essays on Taxation, by E. R. A. Siligman, pp. 285, 286, 304;
Special Assessments, by Victor Rosewater, Columbia University Studies in Political Science, Vol. II., No. 3, pp. 88, 89;
Hare, American Constitutional Law, Vol. I., p. 310;
Cooley on Taxation, 2d Ed., p. 663;
Desty on Taxation, Vol. I., pp. 26, 30;
Hammett v. Philadelphia, 65 Pa. St. 146;
Washington Ave., 69 Pa. St. 352;
Erie v. Russell, 148 Pa. St. 384, 386;
Dietz v. Neenah, 91 Wis. 422, 427;
Dyar v. Farmington, 70 Maine, 527;
Hanscom v. Omaha, 11 Neb. 37.
McClosky v. Chamberlain 37 N. J., 388.
Illinois Central Railroad v. Decatur, 147 U. S. 190.

Analogous cases, where special assessments for similar purposes have been held invalid, are found in

Hammett v. Philadelphia, 65 Pa. St. 146;
Washington Ave., 69 Pa. St. 352;

That the function of the board of sewerage commissioners, in determining the amount of each assessment, is not simply executive, but is of a judicial character, is clear,—

Palmer v. McMahon, 133 U. S. 660;

and it is as unjust in principle to allow such a function to be exercised *ex parte* as to permit a person to be deprived of his property in an action at law without a hearing.

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Erie v. Russell, 148 Pa. St. 384, 386;
Dyar v. Farmington, 70 Maine, 527;
Hanscom v. Omaha, 11 Neb. 37;
Stehmeyer v. City Council, 31 South-Eastern Reporter, 322, 331;
McClosky v. Chamberlain, 37 N. J. L. 388;
N. Y. Life Ins. Co. v. Prest, 71 Fed. Rep. 815.

The definition made by Seligman in his "Essays on Taxation," page 304, marks the distinction, and is supported by the authorities:

> "A special assessment is a payment, made once and for all, to defray the cost of a specific improvement to property, undertaken in the public interest, and levied by the Government in proportion to the particular benefit accruing to the property owner."
>
> "A tax is a compulsory contribution from the person to the Government, to defray the expenses incurred in the common interest of all, without reference to special benefits conferred."
>
> See Desty, Vol. I., p. 275;
> Vol. II., pp. 1237, 1239.
> 2 Dill Mun. Corp. (4th Ed.), Sections 761, 809.

I respectfully ask for a reversal of the judgment of the Court below; and that this Court enter judgment for Plaintiff in Error by directing that a Writ of Certiorari issue as prayed for and such other relief, including costs, as in the judgment of this court he may be entitled to in the premises.

WILLIAM H. CARSON,
Attorney *pro se.*

Supreme Court of the United States.

No. 249.—October Term, 1900.

William H. Carson, Plaintiff in Error, vs. The Sewer Commissioners of Brockton. } In error to the Supreme Judicial Court of Massachusetts.

[May 27, 1901.]

This was a petition to the justices of the Supreme Judicial Court for the county of Suffolk, for a writ of certiorari to the Board of Sewer Commissioners of the city of Brockton, directing them to bring up certain proceedings connected with the assessment of taxes upon petitioner's land to the amount of $42.53, for the maintenance and operation of a public sewer, and for an order quashing the proceedings.

The petitioner alleged the assessment to be illegal and void:

1. Because the city ordinance does not provide for notice to or hearing of persons whose estates are affected thereby, in violation of the State constitution;

2. Because the method of computing the sewer charges is unreasonable and disproportionate;

3. Because petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax for the maintenance and operation of sewers from which he receives no special benefit

4. Because such tax or sewer rental is in violation of the Fourteenth Amendment to the Federal Constitution;

5. Because such tax is permissible only when founded upon peculiar and special benefits to the property so taxed, and then only to the amount of such benefits;

6. Because lands assessed for the construction of sewers cannot be said to receive an additional and special and peculiar benefit from the general oversight and operation of the same.

By an act of the legislature of Massachusetts, passed in 1892, "to give greater power to cities and towns in relation to the construction of sewers," it was enacted as follows:

"Sec. 1. The city council of any city except Boston, or a town, in which common sewers are laid under the provisions of sections one, two and three of chapter fifty of the Public Statutes, or a system of sewerage is adopted under the provisions of section seven of said chapter, may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by every person who enters his particular sewer into the common

sewer, and may change the same from time to time. Such charges shall constitute a lien upon the real estate using such common sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of such city or town. Sums of money so received may be applied to the payment of the cost of maintenance and repairs of such sewers or of any debt contracted for sewer purposes."

Pursuant to this authority the city council of Brockton, on August 23, 1894, adopted an ordinance, of which the following is the material provision:

"SEC. 4. Every person or owner of an estate who enters his particular sewer into a common sewer shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: For unmetered water service, eight dollars; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than eight dollars, it being provided, however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or owner may place at his own expense a water meter, which shall be approved by the said commissioners, to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate or in an action of contract in the name of the city of Brockton."

The petition was denied, and petitioner sued out this writ of error.

Mr. Justice BROWN delivered the opinion of the Court.

This case involves the single question whether a municipal ordinance, making an annual assessment upon property owners for the use of a common sewer, infringes upon any provision of the Constitution of the United States.

The Supreme Judicial Court of Massachusetts held that the petitioner received a special benefit in the use of the sewer for which he might be charged; that the city, by building the sewer and receiving a part of its cost from the petitioner, did not bind itself that the sewer should be maintained forever, or that the petitioner should be at liberty to use it free of further expense; that the charge for using it was a benefit distinct from that originally conferred by building it; that there was no charge unless the sewer were used; that the only questions were whether petitioner's sewer entered the common sewer, and what amount of sewage was delivered to it; and that, if the petitioner wished to be heard on either of these facts, he could resort to the courts; that the city council had a right to fix the charges without notice to the parties interested, unless, under the

pretence of fixing an equitable rate, the ordinance should do what amounted to the taking or destruction of property.

The ordinance imposes an annual rental of eight dollars for unmetered water service, and for metered water service thirty cents per thousand gallons of sewerage delivered to the sewer—the quantity to be so delivered to be determined by the meter readings—with the privilege to the commissioners of making a discount when equitable. As the Supreme Judicial Court held that the municipality had power to adopt this ordinance under the public statutes of the Commonwealth, and that such statutes were no violation of the State constitution, we are concerned only with the question whether the petitioner was thereby deprived of his property without due process of law, or denied the equal protection of the laws within the Fourteenth Amendment.

The validity of the legislative act is assailed upon the ground that no notice was required to be given to the property owner, nor provision made for a hearing, and that the authority given to the city council of Brockton to change the rate of sewerage charges and assessments from time to time manifested an intention on the part of the legislature to assess such property without regard to benefits. There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking, and the compensation to be paid by the city. (*Davidson* v. *New Orleans*, 96 U.S. 97; *Palmer* v. *McMahon*, 133 U. S. 660; *Stuart* v. *Palmer*, 74 N. Y. 183, subsequently re-examined in this court in *Spencer* v. *Merchant*, 125 U.S. 345.)

Obviously these cases have no application to an ordinance which fixes beforehand the price to be paid for certain privileges, and leaves it optional with the taxpayer to avail himself of such privileges or not. As well might it be insisted that an ordinance which fixes water rates, proportioned to the amount furnished, is void, because no notice is required to be given before such rate is fixed, or the taxpayer is assessed his proportionate charge under the ordinance. Where the use of such privilege is left optional with the taxpayer by his election to avail himself of it or not, he contracts with the city to pay the rental fixed by its ordinance, if he elect to use it. In such case there is no room for the question of notice. Where notice will avail nothing, no notice is required. (*Reclamation District* v. *Philips*, 108 Cal. 306; *Amery* v. *Keokuk*, 72 Iowa, 701; *Commonwealth* v. *Lehigh Valley R. R. Co.*, 129 Penn. 429.)

Thus in *Hagar* v. *Reclamation District*, (111 U.S. 701,) it was said by Mr. Justice Field (p. 708): "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be effected shall have notice and an opportunity to be heard. So, also, where title or possession is involved.

But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which the amount is determinable. . . . Of the different kind of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him. Such as poll taxes, license taxes, (not dependent upon the extent of his business,) and, generally, specific taxes upon things or persons or occupations. In such cases, the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter." See also *Parsons* v. *District of Columbia*, (170 U. S. 45.) Under the circumstances of this case no notice was necessary.

Similar considerations apply to the defense that petitioner has been, or is about to be, deprived of his property without due process of law. But of what property has he been deprived? None whatever. There has not been, nor is there anything to indicate there ever will be, any taking of his property within the meaning of the law. Assuming that the imposition of a burden which manifestly belongs to the public, upon private property, constitutes a deprivation of such property within the meaning of the Fourteenth Amendment, there is nothing of the kind involved in this case. There is not even compulsory taxation of the property. The act of the legislature (Chap. 245, Act of 1892) merely provides that the city council "may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by every person who enters his particular sewer into the common sewer, and may change the same from time to time." The municipal ordinance fixes the annual rentals, determinable upon a certain basis of water service, with a provision that the commissioners may make an equitable discount from such rates at their discretion. This was all there was to it. The lot owner could use the sewer or not, as he chose. If he used it, he paid the rental fixed by the ordinance. If he made no use of it, he paid nothing. There is no element of deprivation here or even of taxation, but one of contract, into which the lot owner might or might not enter. There is no allegation in the petition that the petitioner was required by the board of health to discharge into the public sewer. There is no allegation that the particular charges fixed by the commissioners are unreasonable, only that the *method* is unreasonable, that is, that *any* charge is unreasonable.

The stress of petitioner's argument appears to be laid upon the proposition that his property having been once assessed for the construction of the common sewer, he has a right to the free use of such sewer forever afterwards, and that the expense of its maintenance must be raised by general taxation and not by special assessment. This, however, is a question of State policy. It was for the legislature to say whether the construc-

tion of the sewer entitled the adjoining property owners to the free use of it, or only to the right to a free entrance to it of their particular sewers. As held by the Supreme Judicial Court, there can be no doubt that the adjoining property owners did receive a special benefit in being permitted to discharge their private sewers into it. The amount of such benefit was, under the statutes of the Commonwealth, determinable by the city council, which fixed upon a certain rate for unmetered service, and a certain other rate per thousand gallons of sewage discharged for metered service. We have held in the recent case of *Parsons* v. *District of Columbia*, (170 U. S. 45,) that it was competent for the legislative power to assess the amount of benefit specially received by abutting property, and so long as such amount is not grossly excessive, or out of all proportion to the benefit received, there is no reason to complain, particularly if, as held by the Supreme Judicial Court in this case, the question of connecting with the public sewer be left optional with the property owner.

The case is somewhat analagous to that of *Sands* v. *Manistee River Improvement Co.*, (123 U. S. 288,) wherein we held that the exaction of tolls, under a State statute, for the use of an improved national waterway, is not within the prohibition of the due process of law clause of the Constitution. Said Mr. Justice Field (p. 293): "The tolls exacted from the defendant are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated. . . . Tolls are the compensation for the use of another's property or of improvements made by him, and their amount is determined by the cost of the property or of the improvements, and consideration of the returns which such values or expenditures should yield. The legislature, acting upon information received, may prescribe, at once, the tolls to be charged, but ordinarily it leaves their amount to be fixed by officers or boards appointed for that purpose."

It is true that in *Sears* v. *Street Commissioners of Boston*, (173 Mass 350,) decided in May, 1899, construing a similar statute applicable to the city of Boston, the Supreme Judicial Court made a decision which it is difficult to reconcile with its opinion in the case under consideration, and held that "where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston, such as to subject them to a second special assessment. Expenses of this kind should be made the subject of general taxation," citing a number of cases in support of this proposition, none of which appear to be in point. *Hammett* v. *Philadelphia*, (65 Penn. St. 146,) was a case of widening and repaving a public street; *Washington Avenue*, (69 Penn. St. 352,) one of compelling the owners of farm lands lying within one mile on each side of a public highway to pay for grading, macadamising and improving it, by an assessment

upon their lands by the acre; *Appeal of Williamsport*, (41 Atl. Rep. 476,) one of reconstructing a sewer originally built by the city; *City of Erie* v. *Russell*, (148 Penn. St. 384,) a similar case, except that the sewer was originally built by local assessments; *Dietz* v. *City of Neenah*, (91 Wis. 422,) a question of want of notice; *Dyar* v. *Farmington*, (70 Me. 515,) one of assessment for building a railroad; *Hanscom* v. *Omaha*, (11 Neb. 37,) one of the extent to which property was benefited by constructing a sewer. It needs no argument to show that these cases had no pertinence. The question of notice or want of notice was also considered in the Sears case, but the court did not decide that question, intimating, however, an opinion somewhat adverse to the validity of the statute upon this ground.

We are not required, however, to reconcile these cases. It is sufficient that the Supreme Judicial Court held that this case was "free from the elements which in *Sears* v *Street Commissioners* led to the conclusion that the petitioner was assessed without regard to the benefits received by him." Notwithstanding the former case, we think the court was correct in holding in this case that the petitioner and other property owners whose lots abutted on this public sewer did receive a benefit not common to the inhabitants of the city generally, in being permitted to discharge into it the contents of their private sewers, that the amount of such benefit was determinable by the city council, and that in its action there was nothing violative of the Federal Constitution. It was properly said by Chief Justice Holmes in this connection: "No one denies that it was a special benefit to the petitioner to have the sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future; but the city by building it and receiving a part of the cost from the petitioner did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it."

The judgment of the Supreme Judicial Court is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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